Public Prosecutor v An Kee Cheng & Anor

HIGH COURT (SHAH ALAM) — CRIMINAL REVISIONS NO 45–143 OF 2005 AND NO 45–164 OF 2005
ZAHARAH IBRAHIM JC
22 DECEMBER 2005

Criminal Procedure — Consent or sanction — Consent — Transmission of cases to High Court — Whether Public Prosecutor's consent compulsory — Criminal Procedure Code s 177A

Criminal Procedure — Transfer of cases — Power of Public Prosecutor — Public Prosecutor's consent — Transmission to High Court — Abolition of preliminary inquiry — Whether Public Prosecutor's consent compulsory — Criminal Procedure Code s 177A

The accused in both cases were first produced before the magistrate's court. Their cases were subsequently transmitted by the magistrate's court to the High Court without the Public Prosecutor's consent. This court thus exercised its power of revision in respect of both cases.

Held, setting aside the orders of the magistrate's court and ordered both cases to be returned to the magistrate's court pending the consent of the Public Prosecutor for their transmission to the High Court:

(1) The Public Prosecutor's consent is in lieu of the committal order which previously could only be made by a magistrate at the end of a preliminary inquiry, after evidence by deposition had been taken by the magistrate and he was satisfied that there was sufficient evidence for the case to be tried in the High Court. This filtering process through preliminary inquiries has clearly now been replaced with the process of filtering through the mechanism of the Public Prosecutor's consent. Such filtering process is not capable of being performed by a magistrate after the abolition of preliminary inquiries. At the stage of these cases before the magistrate, only the Public Prosecutor has the capacity, with all the information available to him or which he is capable of obtaining from the police or other enforcement agencies, to determine whether there is sufficient evidence for the case to be tried by the High Court in accordance with Chapter XX of the Criminal Procedure Code ('the CPC'). The requirement for consent in s 177A of the CPC, as is the requirement for consent in s 39B of the Dangerous Drugs Act 1952 ('the DDA'), is consistent with the provisions of cll (3) and (3A) of art 145 of the Federal Constitution (see para 17).

(2) When Act A908 repealed the provisions in the CPC on trials by jury or assessors and on preliminary inquiries and inserted s 177A, it can be argued that the implied repeal of the provisions of s 39B(3) and (4) and s 41A of the DDA had occurred (see para 22).

(3) If so, then all transmissions of cases to the High Court to be tried in accordance with Chapter XX of the CPC must comply with the provisions of s 177A of the CPC and without fail the consent of the Public Prosecutor must be obtained before a case is transmitted to the High Court (see para 23).

(4) Whether or not s 39B(3) and (4) and s 41A of the DDA still apply or have been repealed and replaced by s 177A of the CPC, the fact remains that the consent of the Public Prosecutor must be obtained before a magistrate's court transmits to the High Court any case under s 39B of the DDA or any other case that is to be tried by the High Court in accordance with Chapter XX of the CPC (see para 24). Orders of magistrate's court set aside (see para 26).

Petuduh di kedua-dua kes telah dikemukakan dahulu di hadapan mahkamah majistret. Kes-kes mereka telah dipindah oleh mahkamah majistret ke Mahkamah Tinggi tanpa persetujuan pendakwa raya. Mahkamah ini telah melaksanakan kuasa penyemakannya berkenaan dengan kedua-dua kes tersebut.

Diputuskan, mengetepikan perintah-perintah mahkamah majistret dan mengarahkan kedua-dua kes dipulangkan kepada mahkamah majistret sementara menunggu persetujuan pendakwa raya bagi pemindahan yang berikut ke Mahkamah Tinggi:

(1) Persetujuan pihak pendakwa raya adalah sebagai ganti perintah komital di mana sebelumnya hanya boleh dibuat oleh majistret pada akhir pertanyaan awal, selepas keterangan deposisi telah diambil oleh majistret dan beliau berpuas hati bahawa terdapat keterangan yang mencukupi bagi kes tersebut dibicarakan di Mahkamah Tinggi. Proses penapisan ini melalui pertanyaan awal telah dengan jelasnya digantikan dengan proses penapisan melalui mekanisme persetujuan pihak pendakwa raya. Proses penapisan sebegini tidak berupaya dilaksanakan oleh majistret selepas pemansuhan pertanyaan permulaan. Pada tahap kes-kes ini di hadapan majistret, hanya pihak pendakwa raya mempunyai kapasiti dengan kesemua maklumat yang ada atau yang mampu beliau perolehi dari polis atau ejen-ejen penguatkuasaan lain untuk menentukan sama ada terdapat keterangan mencukupi bagi kes tersebut dibicarakan oleh Mahkamah Tinggi menurut Bab XX Kanun Prosedur Jenayah ('KPJ'). Keperluan persetujuan di bawah s 177A KPJ sepertimana keperluan bagi persetujuan di bawah s 39B Akta Dadah Berbahaya 1952 adalah konsisten dengan semua peruntukan-peruntukan kl (3) dan (3A) perkara 145 Perlembagaan Persekutuan (lihat perenggan 17).

(2) Apabila Akta A908 memansuhkan peruntukan-peruntukan dalam KPJ berhubung perbicaraan oleh juri atau penaksir dan berhubung pertanyaan awal

dan telah memasukkan s 177A, boleh dihujahkan bahawa pemansuhan tersirat peruntukan-peruntukan s 39B(3) dan (4) dan 41A Akta Dadah Berbahaya telah berlaku (lihat perenggan 22).

(3) Jika demikian, kesemua pemindahan kes-kes ke Mahkamah Tinggi yang perlu dibicarakan menurut Bab XX KPJ hendaklah mematuhi peruntukan-peruntukan s 177A KPJ dan memastikan persetujuan pihak pendakwa raya diperoleh sebelum suatu kes dipindah ke Mahkamah Tinggi (lihat perenggan 23).

(4) Sama ada s 39B(3) dan (4) dan 41A Akta Dadah Berbahaya masih diguna atau telah pun dimansuhkan dan digantikan oleh s 177A KPJ, kenyataan adalah persetujuan pihak pendakwa raya mesti diperolehi sebelum mahkamah majistret memindah sebarang kes di bawah s 39B ADB ataupun mana-mana kes yang patut dibicarakan oleh Mahkamah Tinggi berikutan Bab XX KPJ (lihat perenggan 24). Perintah-perintah mahkamah majistret diketepikan (lihat perenggan 26).

Notes

For a case on consent, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1377–1414.

For a case on power of public prosecutor, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 4189–4194.

Cases referred to

Karpal Singh & Anor v PP [1991] 2 MLJ 544 (refd)

PP v Oladotun Lukmaru Umaru & Ors [1991] 1 MLJ 187 (refd)

Legislation referred to

Criminal Procedure Code ss 177A(1), (2), (3), 376(1)
Criminal Procedure Code (Amendment) Act 1994 s 8
Dangerous Drugs Act 1952 ss 41A(1), (2), (3), (4), 39B(3), (4)
Federal Constitution art 145 cll 3, 3A

Ng Aik Guan (Ng Aik Guan & Co) for the defendant.
Saiful Edris b Zainuddin (Public Prosecutor) for the prosecution.

Zaharah Ibrahim JC:

BACKGROUND

[1] The accused in case No 45–143 of 2005 was first produced before the magistrate's court in Petaling Jaya on 13 June 2005. After several postponements as the chemist report was not ready and the public prosecutor's consent and requisition had not been obtained, the case was mentioned again before the relevant magistrate's court on 10 October 2005. On that date, the magistrate's court was informed that the investigation papers were with the deputy public prosecutor. The magistrate then gave a final mention date, being 14 November 2005, with a warning that the case

would be transmitted to the High Court notwithstanding the absence of a formal requisition. On 14 November 2005, the case was transmitted to the High Court by that magistrate's court.

[2] The accused in case No 45–164 of 2005 was produced for the first time before the magistrate's court in Petaling Jaya on 12 October 2004 and after being mentioned several times as the public prosecutor's directive was still pending, the relevant magistrate's court, on 19 October 2005, fixed 25 November 2005 as the date for final mention, also with the warning that in the event that the public prosecutor's consent was still not available, the case would then be transmitted to the High Court. On 25 November 2005, the magistrate's court was informed that the investigation papers were still with the deputy public prosecutor. The presiding magistrate promptly transmitted the case to the High Court.

[3] After perusing the record of proceedings for both cases, this court found that both cases had been transmitted without the consent of the Public Prosecutor, whether formal or informal, express or implied.

[4] This court had also received a letter from Messrs Ng Aik Guan & Co, the legal firm representing the accused in case No 45–143 of 2005, requesting that this case be returned to the magistrate's court.

[5] In the circumstances, this court deemed it proper that the power of revision in Chapter XXXI of the Criminal Procedure Code ('CPC') be exercised in respect of both cases.

CONSENT OF THE PUBLIC PROSECUTOR UNDER THE LAW

Position under the Dangerous Drugs Act 1952 ('DDA')

[6] Before the CPC was amended via the Criminal Procedure Code (Amendment) Act 1994 ('Act A908'), every case to be tried in the High Court under Chapter XX of the CPC had to go through the process of preliminary inquiry and would only be produced for trial before the High Court upon the completion of the preliminary inquiry and the relevant magistrate making an order committing the accused to the High Court. The magistrate could only commit an accused to be tried in the High Court if he found, from the preliminary inquiry, that there was sufficient case for such committal.

[7] However, an exception to the process of preliminary inquiry was made for cases under the DDA that can be tried by the High Court only or which are required by the public prosecutor to be tried by the High Court.

[8] This provision is contained in s 41A of the DDA which reads as follows:

> (1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding

a preliminary inquiry under Chapter XVII of the CPC, and cause the accused person to appear or be brought before such court as soon as may be practicable.

(2) When the accused person appears or is brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the CPC.

(3) The trial of a case transmitted to the High Court under subsection (1) shall be by a judge of the High Court sitting alone and the provisions of Chapter XXI and XXII of the CPC shall not apply to such trial

(4) The provisions of subsections (1), (2) and (3) shall have effect notwithstanding any other written law to the contrary.

[9] Apart from the exception in respect of preliminary inquiries, the DDA also contains provisions in s 39B, namely in sub-ss 39B(3) and (4), which reads as follows:

(3) A prosecution under this section shall not be instituted except by or with the consent of the Public Prosecutor.

Provided that a person may be arrested, or a warrant of arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.

(4) When a person is brought before a court under this section before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead, and the provisions of the law for the time being in force relating to the criminal procedure shall be modified accordingly.

[10] As an offence under s 39B of the DDA carries a death sentence, it goes without saying that the offence can only be tried by the High Court. Nevertheless, the transmission of such cases to the High Court cannot be effected by the magistrate under s 41A of the DDA without the consent of the public prosecutor since, according to sub-ss 39B(3) and (4)of the DDA, before the consent of the public prosecutor is obtained, only the following acts can be done:

(1) arresting the accused or issuing a warrant for his arrest;

(2) remanding the accused; and

(3) reading the charge to the accused without calling upon him to plead.

[11] The power of the magistrate to transmit cases under s 39B of the DDA to the High Court under s 41A of the DDA was clarified by His Lordship Edgar Joseph Jr J (as he then was) in the case of *Public Prosecutor v Oladotun Lukmaru Umaru & Ors* [1991] 1 MLJ 187 A copy of the report of this case was sent to this court together with the letter from the accused's counsel as mentioned above.

Position Under the Criminal Procedure Code

[12] Upon the coming into force of Act A908 on 17 February 1995, preliminary inquiries ceased to exist. So did trials by jury or assessors in the High Courts. Consequently, from 17 February 1995 all cases to be tried in the High Court no

longer need to go through the process of preliminary inquiry and all criminal cases tried by the High Court are tried before a judge sitting alone.

[13] Act A908 (via s 8) also inserted the provisions of s 177A into the CPC. According to the Explanatory Statement to the Bill by which Act A908 was enacted:

> 4 Cl 8 provides for the transmission of cases to the High Court, without holding a preliminary inquiry under Chapter XVII of the Code, to be tried by such Court.

[14] The cl 8 mentioned in the Explanatory Statement to the Bill is s 8 of Act A908 which inserted s 177A.

[15] Section 177A of the CPC reads as follows:

> (1) A prosecution in respect of an offence which is to be tried by the High Court in accordance with Chapter XX, shall not be instituted except by or with the consent of the Public Prosecutor:
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> Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.
>
> (2) In any prosecution pursuant to subsection (1), the accused shall be produced before the magistrate's court which shall, after the charge has been explained to him, transmit the case to the High Court and cause the accused to appear or be brought before such court as soon as may be practicable:
>
> Provided that when the accused is brought before the magistrate's court before the Public Prosecutor has consented to the prosecution, the charge shall be explained to him but he shall not be called upon to plead thereto.
>
> (3) When the accused appears or is brought before the High Court in accordance with subsection (2), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX.

[16] As mentioned above, the Explanatory Statement to the Bill by which Act A908 was enacted does not state why the consent of the Public Prosecutor is required for the transmission of cases to the High Court. The speech introducing the Bill in Parliament did not give any explanation for the insertion of the consent requirement either.

[17] However, I am of the opinion that such consent is in lieu of the committal order which previously could only be made by a magistrate at the end of a preliminary inquiry, after evidence by deposition had been taken by the magistrate and he was satisfied that there was sufficient evidence for the case to be tried in the High Court. This filtering process through preliminary inquiries have clearly now been replaced with the process of filtering through the mechanism of the public prosecutor's consent. Such filtering process is not capable of being performed by a

magistrate after the abolition of preliminary inquiries. At the stage of the case before the magistrate as in the case of case No 45–143 of 2005 and case No 45–164 of 2005, only the public prosecutor has the capacity, with all the information available to him or which he is capable of obtaining from the police or other enforcement agencies, to determine whether there is sufficient evidence for the case to be tried by the High Court in accordance with Chapter XX of the CPC.

[18] Under cl (3) of art 145 of the Federal Constitution, the Attorney General has the discretionary power to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a syariah court, a native court or a court-martial. Further, according to cl (3A) of that art, Federal Law may confer on the Attorney General power to determine the courts in which any proceedings which he has power to institute shall be instituted or to which the proceedings shall be transferred. According to sub-s 376(1) of the CPC, the Attorney General is the public prosecutor.

[19] From the decision of the Supreme Court in the case of *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544, it is clear how wide the discretionary power of the public prosecutor is under cl (3) of art 145 of the Federal Constitution. In that case, the Supreme Court said (at p 548):

> For our immediate purpose we wish to refer to art 145(3) of the Constitution which states that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before syariah court etc…. The discretion vested in the Attorney General is unfettered and cannot be challenged and substituted by that of the courts. The reasoning and logic behind such contention is well illustrated in the cases of *Public Prosecutor v Lee Tin Bau* [1985] 1 MLJ 388, *Long bin Samat & Ors v PP* [1974] 2 MLJ 152,; *Public Prosecutor v Datuk Harun bin Haji Idris &Ors* [1976] 2 MLJ 116 and *Poh Cho Ching v PP* [1982] 1 MLJ 86.In the circumstances, it is superfluous to reiterate the same points.

[20] As such, the requirement for consent in s 177A of the CPC, as is the requirement for consent in s 39B of the DDA, is consistent with the provisions of cl (3) and (3A) of art 145 of the Federal Constitution.

Have sub-ss 39B(3) and (4)and s 41A of the DDA been repealed?

[21] A comparison of the provisions of s 177A of the CPC with sub-ss 39B(3) and (4) and s 41A of the DDA shows that s 177A contains provisions similar to sub-ss 39B(3) and (4)of the DDA and it also contains the requirement on the transmission of cases as in sub-s 41A(1)of the DDA as well as provisions on the fixing of the date for trial as are found in sub-s 41A(2)of the DDA. The trials referred to in sub-ss 177A(1) and (3) of the CPC are trials which must be conducted in accordance with Chapter XX of the CPC. The same thing as is mentioned in sub-s 41A(2) of the DDA.

[22] I am therefore of the opinion that when Act A908 repealed the provisions in the CPC on trials by jury or assessors and on preliminary inquiries and inserted

s 177A, it can be argued that the implied repeal of the provisions of sub-ss 39B(3) and (4) and s 41A of the DDA had occurred.

[23] If so, then all transmissions of cases to the High Court to be tried in accordance with Chapter XX of the CPC must comply with the provisions of s 177A of the CPC and without fail the consent of the public prosecutor must be obtained before a case is transmitted to the High Court.

Conclusion

[24] It can be concluded that whether or not sub-ss 396(3)and (4) and s 41A of the DDA still apply or have been repealed and replaced by s 177A of the CPC, the fact remains that the consent of the public prosecutor must be obtained before a magistrate's court transmits to the High Court any case under s 39B of the DDA or any other case that is to be tried by the High Court in accordance with Chapter XX of the CPC.

[25] No power is conferred on any court — whether a subordinate court or a superior court — to transmit to the High Court any case under s 39B of the DDA or any other case that is to be tried in accordance with Chapter XX of the CPC by the High Court if the consent of the public prosecutor has not been obtained.

DECISION AND ORDER

[26] Based on what has been stated above, I find that the orders of the magistrate's court transmitting cases No 45–143 of 2005 and 45–164 of 2005 to the High Court were incorrect in law and invalid. That being the case, those orders are set aside.

[27] Both cases are ordered to be returned to the relevant magistrate's courts pending the consent of the public prosecutor for their transmission to the High Court.

Orders of the magistrate's court to be set aside.

Reported by Loo Lai Mee